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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRANS WORLD AIRLINES, INC., *Petitioner*, v. DELTA AIR LINES, INC., *Respondent*.	No. 679
EASTERN AIR LINES, INC., *Petitioner*, v. CIVIL AERONAUTICS BOARD, *Respondent*.	No. 777

BRIEF OF NATIONAL AIRLINES, INC. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

National Airlines, Inc. ("National") opposes the grant of writs of certiorari requested by Petitioners, Trans World Airlines, Inc. ("TWA") and Eastern Air Lines, Inc. ("Eastern") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

COUNTER STATEMENT OF CASE

National was one of the petitioners for review in the proceeding below.

National's interest in this case arises out of the Civil Aeronautics Board's ("the Board") award of an effective transcontinental air route to TWA between Florida and California. This award was made in the *St. Louis-Southeast Service Case,* a case in which all applications for new air service outside an area extending from St. Louis, Mo. to Miami, Fla. were expressly excluded from the proceeding.

Despite the limitation of the area of the proceeding, the Board certificated TWA between St. Louis and Florida in such a manner that TWA can (and does) operate between Florida and California with only one mandatory intermediate stop, at St. Louis. As a result of this route award, TWA is able to serve the Florida-California route on a most effective and expeditious basis.

The effect of the TWA award on National was threefold:

1. It has resulted in the loss of a substantial volume of traffic from National's operations between Florida and New Orleans. (National participates in a three-carrier through-plane interchange service with American Airlines, Inc. ("American") and Delta Air Lines ("Delta") between Florida and California. National operates the Miami-New Orleans segment of the interchange service).

2. It has had the effect of jeopardizing the grant of National's application for a Florida-California route in the pending *Southern Transcontinental Service Case.* Under long established principles the existence of TWA's service is a relevant and material factor to be considered in

determining whether or not National's proposed route is required by the public convenience and necessity and whether there should be more than one carrier certificated.

3. TWA was selected for the St. Louis-Miami operation on the ground, *inter alia*, that it could provide services to California and other areas west of St. Louis, whereas National could not provide such service because the Board excluded all applications for new routes west of St. Louis.

National petitioned for review of the Board's decision because the decision unfairly prejudiced and or precluded National's long-standing application for a southern transcontinental route.

The opinion of the Court below (Appendix B of each of the Petitions for Certiorari herein) sets forth a full and fair review of the facts. We will not attempt any major restatement of the facts but will attempt to point out the factors which we consider to be of outstanding importanee:

1. As the Court below found, (App. B, pp. B-4-5 to TWA Petition), National insisted at the outset of the proceeding before the Board that the proceeding should either be confined so as to exclude transcontinental services or expanded to include National's application for through service between the Southeast and the Pacific Coast (R. 63-65).

2. The Board responded to this request by:

(a) rejecting the requests for expansion of the issues (R. 92-93; R. 94-95; R. 97-99);

(b) ruling that a mandatory stop at St. Louis would be required without prejudice to a renewal of the re-

quests for more stringent limitations prior to final decision (R. 93-94).

As the Court below found, the Board's consolidation order did not contemplate a hearing on southern transcontinental issues. The order fairly indicated that such issues were not to be considered and that any award to TWA would be so conditioned as to preclude effective transcontinental services. Significantly, the Board did not place in issue the question whether an award to TWA would be mutually exclusive of the pending applications of other parties for southern transcontinental service.

The Board's decision failed to recognize the limitation against southern transcontinental issues; on the contrary it awarded TWA the St. Louis-Southeast route for the express reason that TWA could thereby provide single carrier southern transcontinental service. (TWA, p. B-5)

In reversing and remanding the TWA award, the Court below *did not hold* that the Board was precluded from awarding TWA a transcontinental route in the *St. Louis-Southeast Case*. It merely held, that the Board could not restrict the case to St. Louis-Southeast issues and, without more, grant TWA what is in reality a southern transcontinental route without affording the parties a hearing on the issue of mutual exclusivity where a prima *facie indication* of mutual exclusivity appeared on the record (TWA, B-14).

The factors which form the basis of the Court's opinion appear to be:

1. The Board's own findings confirmed the fact that the route awarded to TWA was an effective southern transcontinental route (TWA, p. B-10).

2. In prior proceedings the Board had concluded that the southern transcontinental route would not support two competing operations (*Ibid.*, p. B-11).

3. The Court concluded from the foregoing facts that a *prima facie* claim of mutual exclusivity had been established and that a hearing on the question was therefore required (*Ibid.* p. B-12)

4. The Court held further that the Board's findings that the award to TWA was not mutually exclusive of the other applications—were not based on evidence, and were not consequent to a hearing on the issue of exclusivity. (*Ibid*, p. B-14)

5. The Court concluded that the parties were entitled to a hearing on the issue of mutual exclusivity and that such a hearing had not been afforded them. (*Id.*)

It is this unusual (and virtually unique) set of circumstances which furnishes the basic foundation of the decision of the Court of Appeals. We submit that the Court's decision is eminently correct and that there is no significant basis for this Court exercising its jurisdiction to review what is, in essence, a vindication of the right to reasonably adequate notice and hearing in air route proceedings.

ARGUMENT

The Application of the Ashbacker Doctrine to Air Route Proceedings Requires the Evaluation of Each Situation on Its Own Merits in Order That the Civil Aeronautics Board May Have Reasonable Flexibility in Administering the Act While Providing the Necessary Due Process of Law.

There is a certain superficial plausibility in the argument that this Honorable Court should resolve the question as to the application of the *Ashbacker Doctrine* to airline route cases. We respectfully submit, however, that an attempt to delineate the precise application of the doctrine at this time would either (a) deprive the affected parties and the public of a fair hearing on important route applications or (b) deprive the Civil Aeronautics Board on the discretion required to manage and dispose of its docket on a most expeditious and effective basis.

The determination whether or not the hearing and award of one application will be mutually exclusive of other applications involves an evaluation of numerous facts which vary from case to case. The Board, with the Courts' approval, has generally exercised certain discretion in hearing and granting conflicting applications based on the Board's judgment that the award of one route will not preclude the award of the competing application. This policy has been applied in many cases and has worked out satisfactorily in most instances.

For a number of years past, the Board and the Courts of Appeal have generally followed what can be termed a "rule of reason" in the application of the *Ashbacker Doctrine* to air route cases. In most cases the Board's evaluation of the problem is acquiesced

in by the parties. In those cases where the matter has been challenged in Court, the Courts have upheld the Board's decision as to the applicability of the doctrine except in one prior case[1] where the Court found that the Board had in reality denied the applicant a fair hearing by hearing and granting one of two mutually exclusive applications while failing to provide a contemporaneous hearing on the other. Each case must necessarily be decided on the basis of its own facts by the Board. Only in one prior case where it was clearly established that an applicant has been denied a fair hearing have the Courts reversed the Board in determination of mutual exclusivity and related issues.[1]

The decision in this case marks another step in the process of reconciling the requirements of administrative expedition against the basic requirement that an applicant be afforded a hearing before his pending application is denied by the award of the route to another applicant.

The decision below affirms the previously established principle that the Board must afford a hearing on *Ashbacker* issues in cases where one application is heard and decided and a competing application is passed over *if there is a prima facie indication of mutual exclusivity*. The Court does not require that this be done prior to hearing but only that such an opportunity for hearing be provided either before or as a part of the main hearing. This is not an onerous duty. Indeed it is no burden at all on the Board. Such opportunity has been provided and exercised in other

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[1] Northwest Airlines, Inc. v. Civil Aeronautics Board, 194 F. 2d 339 (C.A.D.C. 1952).

proceedings without noticeable affect upon the length or scope of the hearing.[1]

The Issues Herein Do Not Justify the Exercise of the Supreme Court's Certiorari Jurisdiction.

In *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 453 (1951) this Honorable Court considered the proper scope of its discretionary jurisdiction with respect to decisions of the Courts of Appeals in review of decisions of Federal Administrative Agencies. The Court stated at 340 U.S. 453, 456:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of Appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari * * *'. *Taft-Hartley Act*, § 10(e) 61 Stat. 148, 29 U.S.C. (Supp. III) § 160(e), 29 U.S.C.A. § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of *importance to to the public*, as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority

[1] In the *Dallas-West Service Case*, Docket No. 7596, the Board afforded the parties the right to introduce evidence re: mutual exclusivity and determined after full consideration, that the case should be deferred on this ground. (J.A. 789-90). Significantly, the Board had previously found, prior to hearing that no mutual exclusivity existed.

between the Circuit Courts of Appeals.' *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712; *Revised Rules of the Supreme Court of the United States*, Rule 38, subd. 5, 28 U.S.C.A. * * *

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193." (*Emphasis Supplied*).

Although the language of the Civil Aeronautics Act is somewhat different from that of Section 10(e) of the *Taft Hartley Act* with respect to the jurisdiction of the Courts of Appeals, it is clearly intended to confer the same type of jurisdiction.

Section 1006 of the Civil Aeronautics Act provides, *inter alia*, as follows:

"(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia * * *. (EAL App. A, p. A-8)

* * * *

"(d) * * * the court shall have exclusive jurisdiction to affirm, modify or set aside the order complained of * * *." (App. A)

* * * *

"(f) The judgment and decree of the court affirming, modifying or setting aside any such order shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in Sections 346 and 347 of Title 28." (EAL App. A, p. A-8)

The principles cited in *Pittsburgh S.S. Co., supra,* are plainly applicable here.

(a) Congress has charged the Courts of Appeals—not the Supreme Court—with the normal and primary responsibility of reviewing and determining the legal adequacy of the Board's decision;

(b) this case does not involve—"principles the settlement of which is of importance to the public, as distinguished from that of other parties";

(c) nor does this case involve—"a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

In this case and in the companion petitions for writ of Certiorari to the Second Circuit Court of Appeals, the decisions apply the so-called *Ashbacker Doctrine* to two differing sets of facts and arrive at conclusions which are different but not in conflict. If this Court were to exercise its jurisdiction and attempt to prescribe more precise rules for the application of the *Ashbacker Doctrine*, it is difficult to perceive how such action would have any significant importance to the public.

Although the petitioners assert that there is a conflict of opinion between the Second Circuit and the District of Columbia Court, the fact is that the two decisions involve different factual situations and, in final analysis, different issues. It is important to consider that the Second Circuit made the same ruling with respect to Eastern Air Lines' claim of mutual exclusivity as did the Court of Appeals for the District of Columbia in an earlier decision. Eastern petitioned the Court of Appeals for the District of Columbia for review of the Board's Order of consolidation in the so-called *Great Lakes-Southeast Service Case* on the ground that the Board had improperly refused to grant a hearing on Eastern's application to extend its Florida-Chicago route to Minneapolis/St. Paul and beyond. The Court of Appeals rejected Eastern's petition in a strongly worded opinion which emphasized the fact that the *Ashbacker Doctrine* "is not available for mere tactical maneuver purposes". *Eastern Air Lines v. Civil Aeronautics Board*, 243 F.2d 607, 609 (1956).

The Second Circuit, when presented with the same set of facts, held that Eastern had not been denied due process of law when the record showed that Eastern had introduced no evidence in support of its claim of mutual exclusivity in a case where the Board had expressly placed the question of mutual exclusivity in issue.

The present case deals with an essentially different factual situation. In the present case the Board indicated to the parties that the case would be confined to St. Louis-Southeast issues and that the Board would consider the imposition of additional restrictions (over and above a mandatory St. Louis stop) in order to

foreclose the grant of an effective southern transcontinental route.

When the Board awarded the route to TWA without any additional restrictions and made affirmative findings that such an award was based on the ability of the route to provide southern transcontinental service, and when the Board's latest consideration of the southern transcontinental route had resulted in a finding that the route would support only one operation (TWA, p. B-11) the Court properly determined that there was a *prima facie* showing of mutual exclusivity and that the Board had denied the parties a fair hearing on their competing applications when it failed to afford a hearing on the mutual exclusivity issue.

In the case before the Second Circuit the prospect of Northwest's operating a Twin Cities-Florida service with only one stop was clear from the outset. The issue of mutual exclusivity was placed in issue by the Board's consolidation order and the Second Circuit found that no evidence had been offered in support of the claim of mutual exclusivity. This contrasts with the present case where the *Board's own findings* establish the effectiveness of the TWA route and where the *Board's own findings* in its latest decision on the point establish the fact that the route would not support two carriers.

The basic point of the decision here is that the facts —as demonstrated by the Board's own findings— establish a *prima facie* showing of mutual exclusivity. The Second Circuit made no such finding.

The contention is also made that the Court was inconsistent in requiring a hearing on *Ashbacker* issues with respect to the TWA award but not requiring a similar hearing on the Delta award. The

Court's opinion sets forth the distinction between these cases. Little more need be said except that there was no *prima facie* indication that the heavily restricted Delta award would preclude a later award to Eastern of a Kansas City-Florida route. Eastern already operates from Florida to both Memphis and St. Louis. The factors governing its extension into Kansas City are very different than those governing the award of a new southern transcontinental award.

The distinction between these two situations illustrates the necessity for flexibility wherein the Board is left with as much freedom to deal with *Ashbacker* problems as is consistent with the basic requirements of a fair hearing.

There is no basis for the exercise of the Court's jurisdiction in these facts nor in any of the other points raised by the petitioners.

CONCLUSION

The Petitions for Certiorari should be denied. They do not present principles the settlement of which are important to the public nor do they involve any real or embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. TWA's southern transcontinental award which has been held invalid by the Court below—has now been in operation for more than 15 months to the serious detriment of National and its interchange partners. National requests that the petitions for certiorari be promptly denied.

Respectfully submitted,

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NATIONAL AIRLINES, INC.

APPENDIX A

Subsection 1006(d) of the Civil Aeronautics Act of 1938, as amended 52 Stat. 977, 49 U.S.C. 601.

Section 1006(d).

"Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Board."

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No. 679

IN THE

Supreme Court of the United States

October Term, 1959

TRANS WORLD AIRLINES, INC.

Petitioner,

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

MEMORANDUM OF CITY OF ST. LOUIS AND CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS

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No. 679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Trans World Airlines, Inc.

Petitioner,

v.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

MEMORANDUM OF CITY OF ST. LOUIS AND CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS

The City of St. Louis, Missouri and the Chamber of Commerce of Metropolitan St. Louis (hereinafter sometimes referred to as "St. Louis") have been named as respondents herein solely by virtue of their appearance as intervenors in the proceedings before the Court of Appeals for the District of Columbia Circuit. Therein, however, St. Louis did not seek to set aside the orders of the Civil Aeronautics Board which authorized valu-

able competitive service by Trans World Airlines, Inc. between St. Louis and the Southeast. On the contrary, as the record makes clear, it was upon petition of St. Louis that the inquiry by the Board was originally undertaken, and throughout the proceedings before the Board and before the Court of Appeals, St. Louis vigorously supported the need for the service eventually authorized by the Board.

St. Louis is therefore wholly in accord with the petitioner herein that the action of the Court of Appeals in reversing and remanding the Board's order is unjustified and should be reviewed by this Honorable Court. The public need for the service authorized was duly found, as the Court agrees; so also were valid grounds for the selection of TWA, as the Court likewise appears to hold. St. Louis is therefore unable to rationalize why the service should be disturbed because of tangential considerations of southern transcontinental service. The issues of such service, present or prospective, are so remote from the issues litigated below that St. Louis has taken no position with respect thereto in any proceedings before the Board. Indeed, the geographical limitation upon all proceedings before the Board, past and present, relating to southern transcontinental service have been so far removed from St. Louis that it has assumed that it would have no interests therein upon which it could premise a meritorious petition for leave to intervene.

On the other hand, the award granted by the Board to TWA has made possible over the past 14 months services of immense value to St. Louis. The improved services furnished by TWA to and from Nashville, Atlanta, Tampa/St. Petersburg and Miami (including nonstop service with the most modern jet aircraft to and from the last named city) represents an important

contribution to the convenience and necessity of thousands of St. Louis' air travelers. The present route pattern has enabled TWA to schedule more and better flights between St. Louis and the Southeast. These schedules, which have been very beneficial to St. Louis, would not be possible if TWA was required to terminate flights in St. Louis. Therefore, St. Louis urgently requests this Honorable Court to continue this service until the issues are adjudicated.

St. Louis' familiarity with the historic service provided by Eastern in this area and with the facts adduced in the extensive proceedings below confirm beyond cavil the Board's findings that the traffic available to TWA to and from points west of St. Louis has contributed significantly to the high quality of service provided by that carrier between St. Louis and the Southeast. To premise legal error upon that circumstance, as the Court of Appeals appears to have done, would seem to bring the law into serious conflict with the basic economics of air transportation and with the public interest.

Consequently, the City of St. Louis, Missouri and the Chamber of Commerce of Metropolitan St. Louis support the position of the petitioner herein.

Respectfully submitted,

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President and
Chief Legal Officer of the Chamber
of Commerce of Metropolitan St. Louis